No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1997
CERTIORARI GRANTED JANUARY 16, 1998

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

KEITH D. SCHACHT,
Plaintiff,

vs.

COMPLAINT
Case No. 95CV3087
Case Classification Type:
Personal Injury - Other:
Case Classification No: 30107

WISCONSIN DEPARTMENT OF CORRECTIONS, KATHRYN J. FARREY, individually and in her official capacity as warden of Oakhill Correctional Institution, CYNTHIA O'DONNELL, individually and in her official capacity as associate warden of Oakhill Correctional Institution, RITA SMICK, individually and in her official capacity as personnel manager for Oakhill Correctional Institution, THOMAS LALIBERTE, individually and in his official capacity as an employee of Oakhill Correctional Institution, RANDALL HEPP, individually and in his official capacity as an employee of Oakhill Correctional Institution, and ONE OR MORE JOHN DOES, individually and in their official capacities as employees of Oakhill Correctional Institution,
Defendants.

NATURE OF ACTION

101. This civil action is brought to redress the violation of the plaintiff's right secured by the Fourteenth Amendment to the United States Constitution to be free from deprivations of his liberty or property without due process of law which occurred on or about February 19, 1993, when he was wrongfully discharged from his employment at Oakhill Correctional Institution.

JURISDICTION AND VENUE

201. This court has jurisdiction over this action pursuant to §§801.03 and 801.04, Wis. Stats.

202. Dane County is the proper venue for this action pursuant to §§801.50, Wis. Stats., because the claim arose in this county.

PARTIES

A. Plaintiff

301. The plaintiff, Keith D. Schacht, is an adult male, who resided in Madison, Wisconsin, County of Dane, State of Wisconsin, at the time the claim arose. His current address is 220 Camilla Lane, Green Bay, Wisconsin, 54311-6890.

B. Defendants

302. Defendant Wisconsin Department of Corrections is an agency of the State of Wisconsin.

303. Defendant Kathryn J. Farrey is an adult female resident of the State of Wisconsin and is the warden of Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

304. Defendant Cynthia O'Donnell is an adult female resident of the State of Wisconsin and is the associate warden of Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

305. Defendant Rita Smick is an adult female resident of the State of Wisconsin and is the personnel manager of Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

306. Defendant Thomas Laliberte is an adult male resident of the State of Wisconsin and is a captain employed by Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

307. Defendant Randall Hepp is an adult male resident of the State of Wisconsin and is a lieutenant employed by Oakhill Correctional Institution, which is located at 5212 Highway M, Oregon, Wisconsin, 53575-0238.

308. Defendant or defendants John Doe are those officials, agents or employees of defendant Wisconsin Department of Corrections whose acts or omissions are at issue in this case and whose names and identities are not known to the plaintiff at this time.

ALLEGATIONS OF FACT AS TO ALL CAUSES OF ACTION

401. Plaintiff began employment with the Wisconsin Department of Corrections on or about October 25, 1982, when he was hired as a correctional officer for the Wisconsin Resource Center. His probationary period ended approximately April 25, 1983.

402. Plaintiff received only favorable job performance reviews while employed at the Wisconsin Resource Center.

403. On approximately June 12, 1983, plaintiff was transferred to a position as a correctional officer at Green Bay Correctional Institution in Green Bay, Wisconsin. His probationary period ended approximately December 11, 1983.

404. Plaintiff received only favorable performance reviews in that position.

405. On approximately December 20, 1987, plaintiff was transferred to a position as a correctional officer at Oakhill Correctional Institution in Oregon, Wisconsin. His probationary period ended approximately June 19, 1988.

406. Plaintiff received only favorable performance reviews in that position until the date he was discharged.

407. While employed as a correctional officer at Oakhill Correctional Institution, plaintiff engaged occasionally in a sideline business of selling various foodstuffs, such as seafood and pizzas to fellow employees.

408. Whenever a fellow correctional officer purchased seafood, plaintiff would customarily accompany the order with some complimentary butter.

409. On or about January 20, 1993, plaintiff had brought some butter into the Oakhill Correctional Institution, intending to give it to a fellow officer who had earlier purchased seafood from the plaintiff.

410. The plaintiff had intended to give this butter to his fellow co-worker in the parking lot before their work shifts began, but he did not have the opportunity to do so. Instead, the plaintiff took the butter inside the Oakhill Correctional Institution with him.

411. At the end of his shift, on the morning of January 21, 1993, the plaintiff wrapped the butter in two plastic garbage bags, which he took from a trash can inside

the Oakhill Correctional Institution. He then placed the wrapped butter into his backpack and prepared to leave work.

412. As the plaintiff was leaving work, defendant Thomas Laliberte detained the plaintiff and asked him to empty his backpack in the presence of two fellow employees of Oakhill Correctional Institution.

413. In addition to the wrapped butter, the search revealed miscellaneous personal items including a three ounce tube of Colgate toothpaste, two black pens, and three red pens.

414. Defendant Laliberte wrongfully and erroneously determined that the butter, the toothpaste, and the pens were State property, when in fact each of those items was the property of the plaintiff.

415. Without making an adequate or a reasonable investigation, Defendant Laliberte immediately suspended the plaintiff without pay.

416. In reckless disregard for the plaintiff's reputation, the defendants conducted an inquiry into the matter in such a way as to disseminate the wrongful accusations of theft against the plaintiff throughout Oakhill Correctional Institution, thereby damaging the plaintiff's good name and reputation.

417. On January 23, 1993, and again on February 4, 1993, Lois Bangs, a fellow corrections officer at Oakhill Correctional Institution who lived at plaintiff's residence, was interrogated by defendant Laliberte regarding the property found in the plaintiff's backpack.

418. Lois Bangs confirmed the plaintiff's version of events, including the fact that the butter was brought from the plaintiff's home to give to a fellow employee, and the fact that the pens and toothpaste also were the plaintiff's own personal property.

419. On February 4, 1993, and again on February 12, 1993, the plaintiff was interrogated by defendant Laliberte and defendant Hepp.

420. Throughout their "investigation" and interrogations of the plaintiff, defendants Laliberte and

Hepp maliciously and recklessly disregarded the truth surrounding the erroneous allegations against the plaintiff.

421. During these interrogations, the plaintiff was repeatedly subjected to harassment in the form of harangues and false accusations from defendants Laliberte and Hepp.

422. The interrogations conducted by defendants Laliberte and Hepp were not reasonably calculated to discern the truth, but were instead a part of a malicious attempt to wrongfully terminate the plaintiff's employment.

423. On February 17, 1993, defendants Laliberte and Hepp called the plaintiff into a so-called "pre-disciplinary hearing." There, defendants Laliberte and Hepp recklessly and maliciously made the erroneous determination that the plaintiff had stolen State-owned or issued property, in violation of Work Rule 3, and had failed to provide accurate and complete information when required by management, in violation of Work Rule 7.

424. The February 17, 1993 meeting between defendants Laliberte and Hepp and the plaintiff, while held under the guise of a "predisciplinary hearing" was not a bona fide hearing. In fact it was part of the effort by defendants Laliberte and Hepp to fabricate a case for wrongfully terminating the plaintiff.

425. Defendant Laliberte and Hepp conducted all of the investigatory hearings, spearheaded the investigation against the plaintiff, and made the final determination that the plaintiff had violated the Work Rules, when they knew or should have known the plaintiff was innocent of any wrongdoing which could reasonably justify disciplinary action.

426. The wrongful termination of the plaintiff was motivated by factors including, but not limited to, prior reasonable criticisms that the plaintiff had made in a reasonable manner expressing his disagreement with the management style of defendants Farrey, O'Donnell, and Laliberte.

427. On February 18, 1993, defendant Kathryn J. Farrey wrongfully terminated the plaintiff's employment,

although she knew or should have known that there was no reasonable basis for doing so.

428. The termination of the plaintiff's employment was the result of the defendants' wrongful actions knowingly taken in concert with each other.

429. After the plaintiff was wrongfully terminated from his position at Oakhill Correctional Institution, the defendants disseminated erroneous and defamatory information to third parties which damaged the plaintiff's reputation and severely impaired his ability to secure subsequent employment.

DAMAGES

501. As the direct and proximate result of the wrongful actions of the defendants, the plaintiff has been caused to suffer (1) a deprivation of rights and privileges guaranteed to the plaintiff by the Fourteenth Amendment to the United States Constitution, namely, a property interest in continued public employment and a liberty interest in his good name and reputation, (2) mental anguish and despair, (3) humiliation and ridicule, (4) stigmatization, embarrassment and defamation, (5) loss of earnings, and (6) loss of earnings capacity, all to his damage in a sum exceeding $5,000.00 to be determined by the court.

VIOLATIONS OF LAW

601. Under the facts of this case, the plaintiff has a claim for the deprivation of a constitutionally protected property interest without due process of law, under color of state law, contrary to 42 U.S.C. §1983.

602. The plaintiff likewise has a claim for deprivation of a constitutionally protected liberty interest without due process of law, under color of state law, contrary to 42 U.S.C. §1983.

DEMAND FOR A JURY TRIAL

701. The plaintiff demands a trial by jury as to all issues in this action.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays that the court grant him judgment against the defendants, jointly and severally, awarding him:

a. Compensatory damages in an amount deemed just by the court;

b. Punitive damages against the individual defendants in amounts deemed just by the court;

c. A reasonable attorneys' fee, including litigation costs; and

d. Such other and further relief as the court deems just.

[date and attorney subscription omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,

v.

Case No. 96 C 0122 S
Dane Cty. Case No. 95 CV 3087

WISCONSIN DEPARTMENT OF CORRECTIONS, KATHRYN J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, RANDALL HEPP and ONE OR MORE JOHN DOES,
Defendants.

PETITION AND NOTICE OF REMOVAL

Defendants, Wisconsin Department of Corrections, Catherine J. Farrey (misnamed as Kathryn J. Farrey in complaint), Cynthia O'Donnell, Rita Smick, Thomas Laliberte and Randall Hepp, (the named defendants) by their attorneys, James E. Doyle, Attorney General, and Richard Briles Moriarty, Assistant Attorney General, hereby petition for and give notice of removal of this Dane County Circuit Court civil action to the United States District Court for the Western District of Wisconsin. The grounds for this petition and notice are as follows:

1. A civil action was commenced and is now pending in the Circuit Court for Dane County, Wisconsin, brought by the plaintiff against the named defendants. That complaint also names "one or more John Does" as possible defendants. Copies of the Summons and Complaint served on the named defendants are attached to and made part of this petition and notice.

2. Plaintiff seeks to assert violations, within Dane County, Wisconsin, of alleged rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. Pursuant to 28 U.S.C. §§ 1331 and 1343, this court has jurisdiction and venue over claimed violations,

within Dane County, Wisconsin, of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

4. Pursuant to 28 U.S.C. § 1441(b), removal of these claims is mandatory upon compliance with 28 U.S.C. § 1446 as herein accomplished.

5. Copies of the Summons and Complaint were served upon the named defendants on January 24, 1996 and later dates.

WHEREFORE, the named defendants represent they have complied with the provisions of law and give notice this action stands removed from the Circuit Court for Dane County, Wisconsin, to the United States District Court for the Western District of Wisconsin.

[date and attorney subscription omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,

v.

Case No. 96 C 0122 S
Dane Cty. Case No. 95 CV 3087

WISCONSIN DEPARTMENT OF CORRECTIONS, KATHRYN J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, RANDALL HEPP and ONE OR MORE JOHN DOES,
Defendants.

ANSWER AND DEFENSES

Defendants, Wisconsin Department of Corrections, Catherine J. Farrey (misnamed as Kathryn J. Farrey in complaint), Cynthia O'Donnell, Rita Smick, Thomas Laliberte and Randall Hepp, (the named defendants) by their attorneys, James E. Doyle, Attorney General, and Richard Briles Moriarty, Assistant Attorney General, respond to the Complaint filed by plaintiff, Keith Schacht, (Schacht) as follows:

101. The named defendants deny the factual allegations of paragraph 101 and demand strict proof.

201. The named defendants deny the factual allegations of paragraph 201 that the Circuit Court of Dane County, by virtue of §§ 801.03 and 801.04, had jurisdiction of the claims under the United States Constitution, as amended, which Schacht seeks to make in the Complaint and demand strict proof.

202. The named defendants admit the factual allegations of paragraph 202 that the claims Schacht sought to make in the Complaint arose in Dane County, Wisconsin.

301. The named defendants admit the factual allegations of paragraph 301.

302. The named defendants admit the factual allegations of paragraph 302.

303. The named defendants admit the factual allegations of paragraph 303.

304. The named defendants deny the factual allegations of paragraph 304 that defendant O'Donnell is now associate warden at Oakhill and demand strict proof. The named defendants affirmatively state defendant O'Donnell is now associate warden of Waupun Correctional Institution and was associate warden at Oakhill when the claim arose.

305. The named defendants deny the factual allegations of paragraph 305 that defendant Smick is now personnel manager at Oakhill and demand strict proof. The named defendants affirmatively state that defendant Smick is now the institution complaint manager at Oakhill and was personnel manager at Oakhill when the claim arose.

306. The named defendants admit the factual allegations of paragraph 306.

307. The named defendants admit the factual allegations of paragraph 307.

308. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 308, since the named defendants can not determine the person or persons to whom Schacht may be referring, and demand strict proof.

401. The named defendants admit the factual allegations of paragraph 401.

402. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 402, since the named defendants can not determine what Schacht means in using the term "favorable", and demand strict proof.

403. The named defendants admit the factual allegations of paragraph 403.

404. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 404, since the named defendants

can not determine what Schacht means in using the term "favorable", and demand strict proof.

405. The named defendants deny the factual allegations of paragraph 405 that he was "transferred" to a position at Oakhill and demand strict proof. The named defendants affirmatively state that Schacht resigned from a Correctional Officer II position at Green Bay Correctional Institution to accept a promotion to a Correctional Officer III position at Oakhill. The named defendants admit the remaining factual allegations of paragraph 405.

406. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 406, since the named defendants can not determine what Schacht means in using the term "favorable", and demand strict proof.

407. The named defendants do not have sufficient information or knowledge to admit or deny the factual allegations of paragraph 407 and demand strict proof.

408. The named defendants do not have sufficient information or knowledge to admit or deny the factual allegations of paragraph 408 and demand strict proof.

409. The named defendants deny the factual allegations of paragraph 409 and demand strict proof.

410. The named defendants do not have sufficient knowledge or information to admit or deny the factual allegations of paragraph 410 and demand strict proof.

411. The named defendants do not have sufficient knowledge or information to admit or deny the implied factual allegations of paragraph 411 that Schacht had brought "the butter" into the institution and demand strict proof. The named defendants admit the factual allegations of paragraph 411 that, at some time after entering the institution on January 20, 1993 and before leaving the institution on January 21, 1993, Schacht wrapped the butter in two plastic garbage bags owned by the State of Wisconsin and placed the wrapped butter into his backpack. The named defendants do not have sufficient information or knowledge to admit or deny the factual allegations of paragraph 411 about when, during the time he was inside the institution, Schacht wrapped the butter

in the garbage bags and put the butter in his backpack, or whether Schacht obtained the garbage bags from a trash can within Oakhill, and demand strict proof.

412. The named defendants admit the factual allegations of paragraph 412.

413. The named defendants deny the factual allegations of paragraph 413 that the "three ounce tube of Colgate toothpaste, two black pens and three red pens" were "personal items", as opposed to items owned by the State of Wisconsin, and demand strict proof. The named defendants admit the factual allegations of paragraph 413 that the wrapped butter, a three ounce tube of Colgate toothpaste, two black pens and three red pens were inside Schacht's backpack. The named defendants admit the factual allegation of paragraph 413 that, by contrast with other "miscellaneous personal items" Schacht may have had inside his backpack, the "wrapped butter" inside Schacht's backpack was not a "personal item" owned by Schacht.

414. The named defendants deny the factual allegations of paragraph 414 and demand strict proof.

415. The named defendants deny the factual allegations of paragraph 415 and demand strict proof.

416. The named defendants deny the factual allegations of paragraph 416 and demand strict proof.

417. The named defendants deny the factual allegations of paragraph 417 that Lois Bangs was "interrogated by defendant Laliberte" and demand strict proof. The named defendants affirmatively state that, on both January 23 and February 4, 1993, Lois Bangs was asked questions by two management representatives, with a union representative present and that, on each occasion, defendant Laliberte was one of the two management representatives present. The named defendants admit the remaining factual allegations of paragraph 417.

418. The named defendants deny the factual allegations of paragraph 418 and demand strict proof.

419. The named defendants admit the factual allegations of paragraph 419.

420. The named defendants deny the factual allegations of paragraph 420 and demand strict proof.

421. The named defendants deny the factual allegations of paragraph 421 and demand strict proof.

422. The named defendants deny the factual allegations of paragraph 422 and demand strict proof.

423. The named defendants deny the factual allegations of paragraph 423 and demand strict proof.

424. The named defendants deny the factual allegations of paragraph 424 and demand strict proof.

425. The named defendants deny the factual allegations of paragraph 425 and demand strict proof.

426. The named defendants deny the factual allegations of paragraph 426 and demand strict proof.

427. The named defendants deny the factual allegations of paragraph 427 and demand strict proof. The named defendants affirmatively state that defendant Farrey formally notified Schacht, by letter dated February 18, 1993, that his employment was terminated effective February 19, 1993.

428. The named defendants deny the factual allegations of paragraph 428 and demand strict proof.

429. The named defendants deny the factual allegations of paragraph 429 and demand strict proof.

501. The named defendants deny the factual allegations of paragraph 501 and demand strict proof.

601. The named defendants deny the factual allegations of paragraph 601 and demand strict proof.

602. The named defendants deny the factual allegations of paragraph 602 and demand strict proof.

701. The named defendants perceive no factual allegations in paragraph susceptible to admission or denial.

DEFENSES

As and for defenses, the named defendants state as follows:

A. The eleventh amendment to the United States Constitution, and the doctrine of sovereign immunity, bars any claim under 42 U.S.C. § 1983 against defendant Wisconsin Department of Corrections.

B. The eleventh amendment to the United States Constitution, and the doctrine of sovereign immunity, bars any claim under 42 U.S.C. § 1983 against any of the named defendants in their official capacities.

C. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Wisconsin Department of Corrections.

D. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Farrey.

E. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant O'Donnell.

F. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Smick.

G. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Laliberte.

H. To the extent Schacht seeks to assert any claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, he has failed to state a claim of relief against defendant Hepp.

I. The conduct Schacht alleges to have been taken by the named defendants did not violate any clearly established and sufficiently particularized federal statutory or constitutional rights of which they reasonably would have known pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and each of the named defendants are entitled to qualified immunity on the federal constitutional claims Schacht seeks to make against them.

J. Even if [the] named defendants did not comply with the provisions of the Due Process Clause of the

Fourteenth Amendment to the United States Constitution in the ad[ver]se employment actions plaintiff challenges, plaintiff is barred from recovery since those adverse employment actions would have been taken in any event.

K. Schacht may not recover for alleged "defamation" under the Due Process Clause of the Fourteenth Amendment to the United States Constitution or 42 U.S.C. § 1983.

L. Claims Schacht might have made under state law are barred either because of the exclusivity doctrines of ch. 102, Wis. Stats., or because Schacht failed to file timely notices of claims, or both.

WHEREFORE, the named defendants request that this court dismiss this action or, in the alternative, grant judgment to the named defendants and for such other relief as may be just.

[date and attorney subscription omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,
v. Case No. 96 C 0122 S
WISCONSIN DEPARTMENT OF CORRECTIONS,
CATHERINE J. FARREY, CYNTHIA O'DONNELL,
RITA SMICK, THOMAS LALIBERTE,
RANDALL HEPP and ONE OR MORE JOHN DOES,
Defendants.

JOINT FINAL PRETRIAL REPORT

Plaintiff, Keith D. Schacht (Schacht) and defendants, Wisconsin Department of Corrections (DOC), Catherine J. Farrey (Farrey), Cynthia O'Donnell (O'Donnell), Rita Smick (Smick), Thomas Laliberte (Laliberte) and Randall Hepp (Hepp), submit this Joint Final Pre-Trial Report.

DATE OF PRE-TRIAL CONFERENCE
AND APPEARANCES FOR THE PARTIES

The final pre-trial conference is scheduled for September 4, 1996, at 1:15 p.m. Plaintiff will appear by Attorney David E. Lasker. Defendants will appear by Assistant Attorney General Richard Briles Moriarty.

STATEMENT OF UNDISPUTED FACTS

Plaintiff and defendants stipulate that the following facts are undisputed:[1]

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[1]The following abbreviations are used: Keith D. Schacht (Schacht); Wisconsin Department of Corrections (DOC); Catherine J. Farrey (Farrey); Cynthia O'Donnell (O'Donnell); Rita Smick (Smick); Thomas Laliberte (Laliberte); Randall Hepp (Hepp); Oakhill Correctional Institution, a facility operated by DOC (Oakhill); Captain Roy Boutin, an employe of Oakhill (Boutin); Sergeant Mattie, an employe of Oakhill (Mattie); William Hartwig, the Food Service Manager at Oakhill (Hartwig); Sergeant B. J. Mikkleson, an employe of Oakhill (Mikkleson); Sergeant Lois Bangs-Schacht, an employe of Oakhill (Bangs); Sergeant Dan Oaks, an employe of Oakhill (Oaks); Officer Arden Wilson, an employe of Oakhill (Wilson); the building designated as the Administration Building (the Administration building).

1. Schacht was employed as a correctional officer at Oakhill with DOC until discharged from his position on February 19, 1993.

2. He was employed as a correctional officer at various facilities operated by the State of Wisconsin from 1982 until his discharge.

3. DOC is an agency of the State of Wisconsin.

4. Between December 1, 1992, and February 18, 1993, the individual defendants held the following positions at Oakhill: Farrey was warden, O'Donnell was associate warden, Smick was personnel manager, Laliberte was a captain and Hepp was a lieutenant.

5. On February 8, 1992, Schacht stated in writing that "I ATTEST TO THE FACT THAT I HAVE CAREFULLY READ THE DEPARTMENT OF CORRECTIONS WORK RULES AND CODE OF ETHICS."

6. Among the Work Rules contained in a September 1991 Employe Handbook, Schacht stated he had carefully read the following:

> DEPARTMENT WORK RULES
>
> All employees of the Department are prohibited from committing any of the following acts:
>
> . . .
>
> 3. Stealing or unauthorized use . . . of state-owned or leased property, equipment, or supplies.
>
> . . .
>
> 7. Failure to provide accurate and complete information when required by management . . . .

7. Before December 1992, Schacht knew DOC Work Rules prohibited him both from stealing, or unauthorized use of, any state-owned or leased property, equipment, or supplies; and from failing to provide accurate and complete information when required by management.

8. By carefully reading an Employe Handbook, as he confirmed in writing on February 8, 1992, Schacht knew that violating any DOC Work Rule was considered

sufficient grounds for disciplinary action ranging from reprimand to immediate discharge.

9. Before December 1992, Schacht was trained by DOC that studies showed correctional officers had more impact than treatment staff on inmate attitudes toward change and rehabilitation, that correctional officers can serve as models to inmates as individuals who are successfully functioning in the outside world as law-abiding citizens and that correctional officers are powerful role models.

10. Before January 21, 1993, Laliberte and Farrey reviewed a written statement by Mikkleson, an employe of Oakhill, in which he stated, in part, that:

a. Schacht had juice belonging to Oakhill in Schacht's backpack in December 1992.

b. Schacht told Mikkleson that, whenever Schacht worked at a cottage at Oakhill and there was extra juice in the refrigerator at the cottage, Schacht took that extra juice home.

c. Mikkleson told Schacht, "don't tell me shit like that because I don't want to know about it," Schacht zipped up his backpack and left.

d. On January 12, 1993, at approximately 6:30 a.m., while Schacht was in Cottage 8 at Oakhill and after Mikkleson walked into Cottage 8, Schacht told Mikkleson he, Schacht, had so much stuff in his backpack he could not get his thermos in it and Schacht also told Mikkleson that his thermos had been in his backpack when he came to work.

11. That statement indicates Mikkleson had testified to its contents under oath.

12. On January 12, 1993, at approximately 6:30 a.m., Schacht had been in Cottage 8 at Oakhill when Mikkleson walked into Cottage 8.

13. For a staff member to engage in theft in a correctional institution, no matter how small the value of

the property involved, is serious and disruptive to the central mission of the correctional institution.

14. If, as was reported to be the case with Schacht, an inmate concludes a staff member has engaged in theft, the staff member can be subjected to blackmail in ways that could seriously jeopardize the security of the institution. For example, a staff member could be pressured by an inmate who knows of thefts by the staff member to ignore drugs or other contraband being smuggled into the institution. The staff member could also be pressured by an inmate who knows of thefts by the staff member to ignore that inmate causing physical harm to other inmates. The staff member could also be pressured to favor the inmate over other inmates in ways which could cause resentment and dangerous results.

15. It fundamentally destroys the goal of returning inmates to society as law-abiding citizens if the inmates are observing staff members, particularly correctional officers, engaging in theft. Instead of serving as role models for the inmates, staff members actually reinforce tendencies in inmates to act illegally.

16. If staff members steal food designated for inmates, the potential consequences are far more egregious. Unlike for persons in open society, who could merely purchase replacement food at a store if it were stolen from them, food available to inmates is restricted and is critically important to inmates. A basic axiom in correctional institutions is not to mess with an inmate's food. To do so could cause inmate protests, disturbances or other dangerous situations.

17. Farrey authorized a search of Schacht to be conducted on January 21, 1993, after he finished his shift and was walking toward the parking lot.

18. Farrey instructed O'Donnell (then Associate Warden) that if any property which appeared to be owned by Oakhill was found, Schacht was to be suspended without pay pending investigation.

19. Before January 21, 1993, Laliberte was instructed by O'Donnell to search Schacht the morning of January 21, 1993, after he walked outside the gate of Oakhill towards

the parking lot and, if any property which appeared to be owned by Oakhill was found, to suspend Schacht without pay pending investigation.

20. On the evening of January 20, 1993, and the morning of January 21, 1993, Schacht worked a shift to which he was assigned as a correctional officer.

21. On the morning of January 21, 1993, at the end of that shift, he was leaving Oakhill to walk to a parking lot outside of Oakhill and go home and was, at that time, wearing or carrying a backpack he owned.

22. After Schacht walked outside the gate of Oakhill towards the parking lot to go home, Laliberte asked Schacht to come into the Administration building.

23. Schacht entered the Administration building in response to that request and Laliberte contacted Boutin and Mattie, asking them to come to the Administration building.

24. On January 21, 1993, Schacht was a member of a union in connection with his employment at Oakhill.

25. After entering the Administration building, Schacht placed his backpack on a table in the lounge.

26. Bangs and other Oakhill employes were waiting in the parking lot for Schacht before driving to a place called Chub's to socialize.

27. Laliberte saw Bangs enter the Administration building, talk to Schacht and then leave the building. Laliberte believed Bangs lived at the same residence with Schacht and maintained a romantic relationship with him and that belief was correct.

28. Schacht told Bangs: "Go down to Chub's. When I find out what the hell is going on, I'll call you and I'll come down there."

29. Schacht asked Laliberte if he could take his backpack out to his truck. Schacht was referring to the truck in which he planned to go home at the end of his shift on January 21, 1993. Laliberte did not grant this request.

30. After Boutin and Mattie arrived, Laliberte asked Boutin, Mattie and Schacht to go to a hallway near the

Warden's office in the Administrative building stating that he wanted the four of them to be out of view of the public.

31. In the presence of Boutin and Mattie, Laliberte asked Schacht to empty his backpack.

32. Sergeant Mattie asked if he was acting as a union representative on Schacht's behalf and was told that he was.

33. In response to Laliberte's request, Schacht removed from his backpack, among other items, two (2) pounds of butter wrapped in two (2) plastic bags, six (6) pens and one (1) 3 ounce tube of Colgate toothpaste.

34. Boutin asked Schacht what was in the plastic bags and he stated it was two (2) pounds of butter.

35. In response to Laliberte or Boutin asking Schacht where he had obtained the two (2) pounds of butter, he stated he had received it from his daughter. Schacht also stated ~~he~~ had additional pounds of butter at his home that he had obtained from his daughter.

36. The two (2) plastic bags that were in Schacht's backpack on the morning of January 21, 1993, were property owned by Oakhill.

37. Schacht had taken those garbage bags owned by Oakhill, used them to wrap the butter before placing the butter in his backpack on January 21, 1993, and was leaving Oakhill to go home with those garbage bags in his backpack.

38. On January 21, 1993, Bill Hartwig was the Food Service Manager at Oakhill.

39. After speaking with Schacht in the hallway outside the Warden's Office about the two (2) pounds of butter, Laliberte asked Boutin, Mattie and Schacht to wait in that hallway stating he would be right back.

40. Laliberte knew the tube of toothpaste which was in Schacht's backpack was the same size, a 3 ounce tube, which was given to inmates of Oakhill for their use.

41. Laliberte and Hepp, as representatives of Oakhill management, required Schacht to provide accurate and complete information in both the investigatory interview held on February 4, 1993, and the second investigatory interview held on February 12, 1993.

42. Under DOC Work Rule 7, Schacht was required to provide accurate and complete information, in both the investigatory interview held on February 4, 1993, and the second investigatory interview held on February 12, 1993.

43. Schacht had told Laliberte and Hepp on February 4, 1993, that, when he received commodity butter from his daughter, that butter was frozen.

44. The two (2) pounds of butter removed from Schacht's backpack on the morning of January 21, 1993, were frozen when they were removed.

45. The reason the butter was frozen when removed from his backpack was because Schacht had removed the butter from one or more freezers at Oakhill during his shift.

46. Schacht told Laliberte and Hepp on February 4, 1993, that he had left the butter on a bathroom window sill from approximately 11:15 p.m., on January 20, 1993, until 1:00 to 1:30 a.m., on January 21, 1993, at which time he squeezed the butter and, finding it was "soft", put it in a freezer at Cottage 8 at Oakhill.

47. Schacht told Laliberte and Hepp on February 4, 1993, that he removed the butter from the freezer at about 6:00 a.m., and put it back on the window sill and also told them that at about 6:30 a.m., when he went to put it in his backpack it was "wet and sweaty" and "starting to thaw."

48. On February 4, 1993, Schacht also told Laliberte and Hepp, that he had, at 6:30 a.m., on January 21, 1993, removed the butter from a cottage freezer and then put both pounds of butter in "a small garbage bag."

49. Schacht actually put the two pounds of butter in two plastic bags during the morning of January 21, 1993.

50. Bangs told Laliberte and Hepp on February 4, 1993, that she had purchased that 3 ounce tube of Colgate toothpaste.

51. That 3 ounce tube of Colgate toothpaste was the same size and type of toothpaste Oakhill issued to its inmates for use by those inmates.

52. As of January 21, 1993, the Shopko store at Westside had not carried 3 ounce tubes of Colgate

toothpaste for more than two (2) years. Laliberte learned this through investigation.

53. On February 4, 1993, Schacht told Laliberte and Hepp that the garbage bags in which the butter was wrapped had been taken from a closet in Cottage 8; whereas on February 12, 1993, Schacht told Laliberte and Hepp that he had taken those garbage bags from an office wastebasket in Cottage 8.

54. A pre-disciplinary meeting was held with Schacht on February 17, 1993, with a union representative present on Schacht's behalf, at which Schacht was informed that, pursuant to an investigation that had been conducted, Schacht was found to be in violation of DOC Work Rules Nos. 3 and 7.

55. DOC had served a letter on Schacht, which he received at least 24 hours before that pre-disciplinary meeting, informing him of that meeting, the purpose of the meeting and that Schacht could have a union representative present at that meeting if he chose.

56. At the February 17, 1993, pre-disciplinary meeting, Schacht was told, with his union representative present, that the basis for the finding that he had violated Work Rule No. 3 was that he had removed state-owned property without authorization to do so; and that the basis for the finding that he had violated Work Rule No. 7 was that he had, during the investigation, provided incomplete, inaccurate and contradictory information.

57. At the pre-disciplinary meeting, he was also told, with his union representative present, that the potential discipline for the violations of the work rules which he was found to have committed could include termination of his employment.

58. In light of the time and expense DOC invests in training and providing experience to correctional officers with long tenure at DOC such as Schacht, it is important to the mission of DOC to assure discipline is imposed only when correctional officers actually engage in misconduct and when discipline is required.

59. Each of the defendants knew, when the suspension and discharge occurred, that discipline could not be

imposed on any correctional officer to further any personal vendetta against that correctional officer, to prevent that correctional officer from applying for a vacant position or to punish that correctional officer for any illegitimate purpose.

60. Each of the defendants knew that not providing a correctional officer a meaningful opportunity to be heard prior to discharge from employment was not lawful.

61. Schacht, under his union contract, had rights to file grievances challenging both the suspension without pay and the discharge.

62. Schacht took advantage of those rights by filing grievances challenging both the suspension without pay and the discharge.

63. Schacht was provided opportunities to challenge both the suspension without pay and the discharge through the third step of those grievance processes.

64. On June 3, 1994, the union representing Schacht dropped those grievances even though they could have been pursued to evidentiary hearing before an arbitrator.

STATEMENT OF MAJOR FACTUAL ISSUES

1. Was Schacht treated fairly and impartially regarding the decision to suspend him without pay on January 21, 1993?

2. Was Schacht treated fairly and impartially regarding the decision to discharge him from employment effective February 18, 1993?

3. Did Schacht receive the process to which he was due regarding the decision to suspend him without pay on January 21, 1993?

4. Did Schacht receive the process to which he was due regarding the decision to discharge him from employment effective February 18, 1993?

[The balance of the Joint Final Pretrial Report, disclosing witnesses, exhibits, and other matters unrelated to the facts are omitted.]

[date and plaintiff's and defendants' attorney subscriptions omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHAC[H]T,
Plaintiff,

v.

MEMORANDUM AND ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE and RANDALL HEPP,
Defendants.

96-C-122-S

Plaintiff Keith D. Schac[h]t commenced this civil action pursuant to 42 U.S.C. §1983 in Dane County Circuit Court. Defendants Wisconsin Department of Corrections, Catherine J. Farrey, Cynthia O'Donnell, Rita Smick, Thomas Laliberte and Randall Hepp removed the action to this Court. Plaintiff alleges that he was suspended without pay and subsequently terminated from his employment by the defendants without due process of law.

On July 15, 1996 defendants filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response

must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Keith D. Schact [sic] was employed as a correctional officer at Oakhill Correctional Institution, Oregon, Wisconsin (OCI). Defendant Wisconsin Department of Corrections is an agency of the State of Wisconsin. At all times material to this action, defendant Catherine J. Farrey was the warden, and defendant Cynthia O'Donnell was the associate warden at OCI. Defendant Rita Smick was the personnel officer. Defendants Thomas Laliberte and Randall Hepp were correctional officers.

On February 8, 1992 plaintiff attested in writing that he had carefully read the Department of Corrections Work Rules and Code of Ethics. The Work Rules provided in pertinent part as follows:

> All employees of the Department are prohibited from committing any of the following acts:
>
> ....
>
> 3. Stealing or unauthorized use... of state-owned or leased property, equipment or supplies.
>
> 7. Failure to provide accurate and complete information when required by management....

Plaintiff knew that a violation of these Work Rules was considered sufficient grounds for disciplinary action ranging from reprimand to immediate discharge.

Prior to January 21, 1993 defendant Farrey suspected, based on a written statement by Sergeant B. J. Mikkleson and reports by inmates, that plaintiff was stealing food.

On this information she authorized a search of plaintiff to be conducted as he was walking toward the parking lot after his shift.

Defendant Laliberte asked plaintiff as he was leaving Oakhill on January 21, 1993 to return to the Administration Building. Plaintiff's union representative was also present. Defendant Laliberte searched plaintiff's backpack. He found two pounds of butter wrapped in two plastic garbage bags, six pens and one 3 ounce tube of toothpaste. The two plastic bags were Oakhill property. Defendant Laliberte spoke to Bill Hartwig, the Food Service Manager, concerning the butter and its labeling used by Oakhill. It matched the butter in plaintiff's backpack. Defendant Laliberte suspended plaintiff without pay pending an investigation.

Defendants Laliberte and Randall Hepp held investigatory interviews with plaintiff on February 4, 1993 and February 12, 1993. It is disputed whether or not plaintiff provided accurate and complete information during these meetings. It is also disputed whether defendants conspired to terminate his employment, trumped up false charges against him and acted in bad faith.

A pre-disciplinary meeting was held with plaintiff on February 17, 1993 with a union representative present on plaintiff's behalf. Plaintiff had received notice of the meeting at least 24 hours prior to the meeting informing him of its purpose. At the meeting Plaintiff was told that there was a factual basis for finding he had violated Work Rule 3, removing state owned property without authorization and Work Rule 7, failing to provide complete and accurate information. He was advised that the potential discipline for such violations was termination. Plaintiff was asked whether he had any statement he would like to [sic] and he replied, "No".

On February 18, 1993 a meeting was held with plaintiff and his union representative at which a letter dated February 18, 1993 from Farrey terminating his employment was read. Plaintiff was again asked if he wished to make a statement and he declined.

Plaintiff applied for unemployment compensation benefits after he was suspended without pay on January 21, 1993 and filed an additional application after he was discharged from employment effective February 18, 1993. Under plaintiff's union contract he had rights to file grievances challenging both the suspension without pay and the discharge. He pursued his grievances through the third step of the discharge. He pursued his grievances through the third step of the process. On June 3, 1993 the union decided not to pursue plaintiff's grievance to arbitration.

MEMORANDUM

Plaintiff claims that he was deprived of property and liberty interests in violation of the Fourteenth Amendment due process clause pursuant to 42 U.S.C. § 1983. Defendants contend that plaintiff's claims against the Wisconsin Department of Corrections and the individual defendants in their official capacities are barred by the Eleventh Amendment. Plaintiff agrees his claims for money damages are barred but pursues his claims for injunctive relief. Plaintiff does not, however, request injunctive relief in his complaint and such relief is not appropriate where plaintiff is seeking monetary relief rather than reinstatement. Defendants' motion to dismiss plaintiff's claims against the Wisconsin Department of Corrections and the individual defendants in their official capacities will be granted.

Plaintiff seeks to add Sergeant B. J. Mikkleson as a defendant in this action. This motion will be denied as untimely under Rule 20, Federal Rules of Civil Procedure. There are no allegations that Mikkleson participated in the decisions to suspend or terminate plaintiff or that he denied him due process protections. Nor is there any reason to delay trial at this late date in the event further proceedings should become necessary as a result of the addition requested. Final pre-trial conference and discovery have been held and completed respectively.

Plaintiff claims that he was deprived of his continued employment without procedural due process protections when he was suspended without pay on January 21, 1993

and terminated on February 18, 1993. For purposes of deciding defendants' motion for summary judgment it is assumed that plaintiff had both protected property and liberty interests in his continued employment. Defendants move for summary judgment based on the ground that plaintiff received the due process protections to which he was entitled. Any disputes of fact remaining concerning plaintiff's conduct or the investigation itself are not material or relevant to resolve defendants' motion.

In his complaint and brief in opposition to defendants' motion for summary judgment plaintiff pursues a procedural due process claim and further contends that defendants conspired to terminate his employment, trumped up false charges against him and acted in bad faith. He claims he was not treated fairly and impartially. Although not pursued by either party plaintiff may be arguing that this unfairness violated his substantive due process rights.

The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Zinermon v. Burch, 494 U.S. 113, 125 (1190). To state a substantive due process claim, in addition to alleging that the decision was arbitrary and irrational, plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies. New Burnham Prairie Homes v. Village of Burnham, 910 F. 2d 1474, 1481 (7th Cir. 1990). Plaintiff has neither alleged nor shown a separate constitutional violation. Further, he has not alleged or shown the inadequacy of state law remedies. Finally, plaintiff has neither stated a substantive due process claim nor cited any authority for it.

Accordingly, the Court addresses plaintiff's only claim, that of procedural due process. Plaintiff was suspended without pay on January 21, 1993. He did not receive an opportunity to be heard prior to his suspension. The Seventh Circuit Court of Appeals addressed the question of whether a pre-suspension hearing is a required procedural due process protection in Jones v. City of Gary,

Indiana, 57 F. 3d 1435 (7th Cir. 1995). The Court applied the three factors provided in Matthews v. Eldridge, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying these factors to the case of Jones, a firefighter, who was suspended without pay for failing to return to work from sick leave, the Court held as follows:

> Thus, there was no risk that Jones was erroneously deprived of his protected interest in employment without a pre-suspension hearing and thus we hold that Jones was not denied due process by the failure of the fire department to provide him with a pre-suspension hearing.

Jones, 57 F.3d at 1443.

In Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F. 3d 623 (7th Cir. 1995), the Court held that a bus driver who was suspended without pay after an accident was not entitled to a pre-suspension hearing under the due process clause. The Court stated at p. 628:

> Applying *Matthews* and these subsequent cases to the facts at hand, we have little trouble concluding that due process did not mandate giving Chaney additional notice or a hearing before Pace suspended him. Chaney's interest in avoiding a suspension is significant. Nevertheless, Chaney was on notice to why he was being suspended and Pace's interest in both managerial efficiency and in public safety clearly outweigh Chaney's interest in a pre-suspension hearing. The Constitution does not mandate additional protections at this stage.

Here plaintiff was a correctional officer accused of stealing. He was suspended without pay on January 21,

1993 without an opportunity to be heard. Plaintiff was advised of the reason for his suspension. Using the Matthews factors, the government's interest in the efficient and safe operation of the correctional institution outweighs the plaintiff's interest in a pre-suspension hearing. An investigation was conducted after the suspension and plaintiff was given an opportunity to be heard in two interviews and at a pre-disciplinary hearing. These procedures lessened the risk of an erroneous deprivation of plaintiff's protected interests. Due process does not require that plaintiff be provided a pre-suspension hearing.

Plaintiff also claims that he was denied due process protections when he was terminated on February 18, 1993. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-43 (1985), the United States Supreme Court held that a person who has a property interest in employment may not be discharged without a prior opportunity to hear the employer's evidence and respond to the claims against him. The pre-termination opportunity to be heard need not be elaborate if there is timely post-termination process. Id. The Court held in Chaney that due process required a pre-termination notice and an opportunity to respond where a bus driver was terminated after an accident even where post-termination procedures exist. The Court further found that the grievance and arbitration procedures satisfied the requirements of post-deprivation due process.

It is undisputed that plaintiff was provided notice that he may be terminated for alleged violation of work rules. He was provided an opportunity to be heard at two investigatory interviews. At a pre-disciplinary hearing on February 17, 1993 he was given an opportunity to be heard on the charges. When the letter of termination was read to him at a meeting the following day he was also given an opportunity to make a statement. Plaintiff was given notice and an opportunity to be heard prior to his February 18, 1993 termination. This satisfied the pre-termination due process requirement.

Subsequent to his termination plaintiff pursued the grievance procedures available to him. These procedures

satisfied the requirements of post-deprivation procedural due process.

Plaintiff received the procedural due process protections to which he was entitled concerning both his suspension and his termination. Accordingly, defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that plaintiff's motion to add Sergeant B.J. Mikkleson as a defendant is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants against the plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 13th day of September, 1996.

BY THE COURT:

/s/ John C. Shabaz

JOHN C. SHABAZ
District Judge

In the

United States Court of Appeals

for the Seventh Circuit

No. 96-3633

Keith D. SCHACHT, Plaintiff-Appellant,
v.
WISCONSIN DEPARTMENT OF CORRECTIONS,
et al., Defendants-Appellees.

Appeal from the United States District
for the Western District of Wisconsin.
No. 96-C-122-S--**John C. Shabaz**, Chief Judge.

Argued April 21, 1997 - Decided June 17, 1997.

Before BAUER, CUDAHY and DIANE P. WOOD, *Circuit Judges*.

DIANE P. WOOD, *Circuit Judge*. The dispute in this case began when plaintiff Keith Schacht was discharged from his position as a correctional officer at the Oakhill Correctional Institution, located in Oregon, Wisconsin. Believing that the Wisconsin Department of Corrections (WDOC) and several officials at the correctional facility (acting in both their individual and official capacities) denied him his right to both substantive and procedural due process in the pre- and post-termination proceedings, Schacht filed suit in Dane County Circuit Court, alleging various violations of 42 U.S.C. § 1983. The defendants, relying on 28 U.S.C. § 1441(a), then removed the case to federal court, where the district court below dismissed the claims against the state defendants that were barred by sovereign immunity and granted summary judgment to the defendants on all remaining claims. Unfortunately, all of these efforts were for naught. Because the district court

lacked subject matter jurisdiction over this case, we must vacate its judgment and instruct the district court to send all claims back to square one--Dane County Circuit Court.

I

On the morning of January 21, 1993, Keith Schacht had just completed his overnight shift at Oakhill and was headed for the exit door when he was stopped by defendant Captain Thomas Laliberte, who pulled Schacht aside and asked Schacht to empty his backpack. Schacht complied, and the ensuing search established that his backpack contained (among other things) two garbage bags, six pens, two pounds of government commodity butter, and a three-ounce tube of toothpaste. To the defendants, each of these items appeared similar to items used in the facility. Their presence in the backpack therefore confirmed the defendants' suspicions that Schacht had been stealing items from the prison. Schacht, however, maintained that the pens, butter, and toothpaste all belonged to him, and that it was a common practice, in which the prison management acquiesced, for Oakhill employees occasionally to take garbage bags for their personal use.

The upshot of all this for Schacht was a suspension without pay pending an investigation. The prison officials conducted a series of interviews and hearings, but Schacht believed the deck was stacked against him, as the hearings were conducted by Laliberte and Randall Hepp, both of whom Schacht believed were biased against him for being too much of a "by the book" officer. Ultimately, Schacht was formally discharged on February 18, 1993, and after aborted efforts at various grievance proceedings, Schacht filed suit in Wisconsin state court. In his complaint, which named the WDOC and a host of employees at Oakhill as defendants, Schacht asserted that he had been wrongfully discharged and deprived of his constitutionally protected liberty and property interests in continued employment, all in violation of the due process clause of the federal Constitution. The complaint asked for compensatory and punitive damages against all defendants, as well as costs, fees and any other relief the court deemed appropriate.

II

At this point, all was well. Unbeknownst to both sides, however, the roof fell in when the defendants removed (without objection from Schacht) the case to federal court and the district court proceeded to resolve the case on the merits. The Achilles' heel of the case was the group of claims for monetary damages against the WDOC and the state officials in their official capacities, which were barred by sovereign immunity. The presence of these claims meant that the district court did not have original jurisdiction over the entire action, and thus that the defendants' removal under 28 U.S.C. § 1441 was improper.

We explained why this is so in *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.1994), in which state defendants similarly tried to remove an action containing claims barred by state sovereign immunity as reflected in both the Eleventh Amendment and *Hans v. Louisiana*, 134 U.S. 1, (1890). We concluded that the district court lacked jurisdiction over the case because sovereign immunity acted as a limit on the original subject matter jurisdiction of the courts with respect to the barred claims (rather than as a form of common law immunity). *Frances J.*, 19 F.3d at 340, citing *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1400 (7th Cir.1993). The lack of jurisdiction over some claims in the case precluded removal of the action as a whole, because § 1441(a) confers removal jurisdiction only where the district court has the authority to adjudicate all of the claims in the case. *Frances J.*, 19 F.3d at 341. In so holding, we rejected the notion that the district court could cure this problem by simply dismissing or remanding the barred claims. Section 1441(c) contemplates certain cases in which separate and independent removable claims are joined with others that are not removable, but it gives the district court the choice of retaining the full case and "determining all issues" therein, or remanding all matters in which state law predominates. As we pointed out in *Frances J.*, this implies that the district court must have the *power* to determine all the issues in the case, either through original or supplemental jurisdiction. Claims barred by sovereign immunity stand on different footing than other claims that

are not independently removable, because of the affirmative limitation on jurisdiction imposed by the sovereign immunity doctrines. See *Frances J.*, 19 F.3d at 340 n. 4. Under § 1441, "if even one claim in an action is jurisdictionally barred from federal court by a state's sovereign immunity, or does not otherwise fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court." *Frances J.*, 19 F.3d at 341. See also *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 987 (7th Cir.1996) ("removal is proper only if the action originally could have been brought in the district court"), *cert. granted*, 117 S.Ct. 1424, (1997); *Gorka by Gorka v. Sullivan*, 82 F.3d 772, 774-75 (7th Cir.1996) (following *Frances J.*); 28 U.S.C. § 1441(a) (discussing removability of *actions*, rather than claims).

In Schacht's case, it is evident that at the time of removal, the complaint included several claims that were barred by sovereign immunity. Schacht wanted monetary relief from the WDOC and from five Oakhill employees, whom he was suing in both their official and individual capacities. Since the State of Wisconsin would be the real party in interest with respect to the official capacity and WDOC claims, the district court could not adjudicate those claims without an authoritative waiver of the state's sovereign immunity. See *Frances J.*, 19 F.3d at 342, citing *Dugan v. Rank*, 372 U.S. 609, 620, (1963) (noting that a lawsuit is against a sovereign if the judgment from successful claims would inevitably be paid from the public treasury). See also *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06, (1990) (A state's waiver of sovereign immunity must be explicit and unambiguous). The defendants here and the district court below were undoubtedly aware of this problem, as it took no time for the district court to grant the defendants' motion to dismiss the claims against the WDOC and the Oakhill employees in their official capacities. As we noted above, however, the dismissal of the barred claims on the merits did not cure the initial defect in removal.

At oral argument, we raised the issue of jurisdiction and the propriety of removal *sua sponte*, and requested supplemental briefing from both sides on the relevance of *Frances J.* to this case. See *Edelman v. Jordan*, 415 U.S. 651, 677-78, (1974) (subject matter jurisdiction can be addressed at any stage of a given legal proceeding). Schacht opted to concede the jurisdictional flaw, but the defendants contend that we may reach the merits of this case notwithstanding *Frances J.* because remand would be futile and would result in a waste of judicial resources. Specifically, the defendants contend that if we remand, the state court will simply dismiss the official capacity claims and the claims against the WDOC for failing to state a claim on which relief may be granted, or on grounds of sovereign immunity, and duplicate the analysis the district court devoted to the remaining claims. See *Lindas v. Cady*, 441 N.W.2d 705, 709 (Wis.1989) (noting that "states are not 'persons' within the meaning of § 1983"). See also *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069, (1997) (noting that "sec.1983 actions do not lie against a State").

Even if the defendants have accurately forecast the fate of this case on remand, we are not free to disregard a jurisdictional defect. See *Arizonans*, 117 S.Ct. at 1071. Contrary to their suggestion, there is no "futility" exception to § 1447(c). The Supreme Court noted that the literal words of § 1447(c) leave no room for such an exception. See *Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 89, (1991). See also 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.") (Emphasis added). Furthermore, in *Smith v. Wisconsin Dept. of Agriculture*, we rejected an identical "futility" argument, instead holding that remand was required even if the state court would only respond by dismissing the remanded claims. 23 F.3d 1134, 1139 (7th Cir.1994). Although in some previous cases involving the removal of claims barred by sovereign immunity (of which *Smith* was one), we have remanded only the barred claims, while deciding the remaining claims on the merits, the

jurisdictional issue was not called to the court's attention. See, for example, *Smith*, 23 F.3d at 1142-43. See also *Weinberger v. Wisconsin*, 906 F.Supp. 485, 491 (W.D.Wis.1995), *judgment aff'd*, 105 F.3d 1182 (7th Cir.1997). They do not, therefore, support the proposition that the *Frances J.* rule is limited in its application. Last, while the principles of judicial economy are not to be taken lightly, these principles cannot override constitutional or statutory limits on subject matter jurisdiction. We regret that the improper removal in this case will lead to yet additional litigation, but we remind both sides that much time and effort could have been saved had further consideration been given to the propriety of removal at the outset.

We therefore VACATE the judgment of the district court, and REMAND this case with instructions for the district court to remand the entire action to state court. Although Schacht requested costs and attorneys' fees in his supplemental brief, we agree with the state that his request was improperly presented and without merit in any event. Each side is to bear its own attorneys' fees and costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,

v.

ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, and RANDALL HEPP,
Defendants.

96-C-122-S

Pursuant to judgment previously entered in the above entitled matter by the United States Court of Appeals for the Seventh Circuit on June 17, 1997,

ORDER

IT IS ORDERED that the above entitled action is REMANDED in its entirety to the Circuit Court for Dane County, Wisconsin.

Entered this 15th day of July, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

STATE OF WISCONSIN
DANE COUNTY CIRCUIT COURT BRANCH 13

KEITH D. SCHACHT,
Plaintiff,
v. Case No. 95 CV 3087
WISCONSIN DEPARTMENT OF CORRECTIONS,
KATHRYN J. FARREY, CYNTHIA O'DONNELL,
RITA SMICK, THOMAS LALIBERTE,
RANDALL HEPP and ONE OR MORE JOHN DOES,
Defendants.

ORDER GRANTING MOTION TO STAY
PROCEEDINGS PENDING RESOLUTION
OF PETITION FOR WRIT OF CERTIORARI

This court having before it defendants' Motion to Stay Proceedings Pending Resolution of Petition for Writ of Certiorari, and being advised in the premises, and finding that Motion proper and one which should be granted, IT IS HEREBY ORDERED that this proceeding is stayed pending resolution of the Petition for Writ of Certiorari which defendants represent they will be filing by September 15, 1997, that defendants are to provide this court with a copy of that Petition after it has been filed, and that defendants' counsel is to inform this court, and opposing counsel, of the resolution of that Petition within twenty (20) days after that resolution by the United States Supreme Court.

Dated this 29th day of August, 1997.

BY THE COURT:
/s/ Michael Nowakowski
Michael Nowakowski
Circuit Court Judge